TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 602

GALEN H. WELCH, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH COLLECTION DISTRICT OF CALIFORNIA, PETITIONER

vs.

OBISPO OIL CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 28, 1936

CERTIORARI GRANTED FEBRUARY 8, 1937

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1 [Names and addresses of solicitors omitted in printing.]

2–3 [Citation in usual form showing service on Peirson M. Hall, filed Dec. 24, 1935, omitted in printing.]

4 In United States District Court for the Southern District of California, Central Division

At Law No. 3334–J

OBISPO OIL COMPANY, A CORPORATION, PLAINTIFF

vs.

GALEN H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH COLLECTION DISTRICT OF CALIFORNIA, DEFENDANT

Amended complaint

Filed Oct. 21, 1933

Now comes the Plaintiff, Obispo Oil Company, a corporation, and through its attorneys complains of the defendant, Galen H. Welch, and as and for a cause of action against said defendant alleges:

I

That the plaintiff, Obispo Oil Company, is and was at all times hereinafter mentioned, a corporation organized under the laws of the State of California, and having its principal office and place of business at San Luis Obispo, California.

II

That the jurisdiction of this Court is dependent upon a Federal question in that the cause arises under the laws of the United
5 States of America pertaining to Internal Revenue, to-wit, the Revenue Act of 1918 and prior and subsequent Acts.

III

That the defendant, Galen H. Welch, was during the period from April 6, 1926, to June 30, 1933, inclusive, Collector of Internal Revenue for the Sixth Collection District of California, duly commissioned and acting pursuant to the laws of the United States, and resides and has his office in the City of Los Angeles in said State of California.

IV

That this action is brought against the defendant as an officer acting under and by virtue of the Revenue Acts of 1918 and 1926 on account of acts done under color of his office and of the Revenue Laws of the United States as will hereinafter more fully appear.

V

That the plaintiff duly filed with the proper officer designated by statute its corporate income and profits tax returns for the calendar year 1920, as required by law and within the period prescribed by law, that is, on, to-wit, March 15 and June 13, 1921, and duly paid the tax shown to be due thereon, namely, $426.65. Thereafter, during the year 1923, additional tax for the calendar year 1920 in the amount of $2,864.40 was assessed against and paid by the plaintiff. Neither of the amounts above mentioned however, are here in issue.

VI

During June, 1926, Commissioner of Internal Revenue
6 erroneously and illegally assessed additional corporate income and profits taxes for the calendar year 1920 against the plaintiff herein in the amount of $264,017.74, plus interest in the amount of $2,144.69 and demanded payment thereof from plaintiff, and threatened to enforce payment of said tax by distraint and sale of plaintiff's property.

VII

Plaintiff objected to the assessment, collection and payment of said additional tax for the calendar year 1920 for the reason that the assessment, collection and payment of said tax and interest was erroneous, illegal, and in excess of that due from the plaintiff for said calendar year. The reasons therefor and the facts upon which plaintiff's objections and this complaint are based are as follows:

(1) The Commissioner of Internal Revenue erroneously added to the plaintiff's taxable income for the calendar year 1920 certain impounded funds released to the plaintiff during the year 1920. These funds consisted of moneys collected during the period from 1914 through 1919 by a receiver appointed by the United States District Court pending the outcome of certain litigation then being prosecuted between this plaintiff and the United States. The receiver appointed by the Court was at all times in possession and control of the entire properties of the plaintiff. On the termination of the litigation, during the year 1920, the funds accumulated by the receiver were turned over to the plaintiff.

7 The funds so collected by the receiver during the years 1914 to 1919 were taxable income to the recipient when actually collected and received by the receiver during those said years. Neither said funds nor any part thereof were taxable income to the plaintiff in 1920 on release thereof by said receiver.

(2) In the alternative, assuming but not conceding that the funds released by the receiver to the plaintiff during the year 1920 constituted taxable income to the plaintiff for said year, the Commissioner of Internal Revenue erroneously determined the income of

the plaintiff subject to tax for said year 1920 in the following particulars:

(a) Said impounded funds consisted largely of United States Government bonds in which during said period the receiver had invested the funds collected. The actual market value of said bonds at the date they were released and turned over to the plaintiff during the year 1920 was $47,822.62 less than the original cost thereof when purchased by said receiver. The Commissioner of Internal Revenue erroneously and illegally included these bonds in plaintiff's taxable income for the calendar year 1920 at original cost to the receiver instead of their fair market value at date they were turned over to the plaintiff. Even though the impounded funds turned over to the plaintiff during the year 1920 constituted income of plaintiff for said year, nevertheless the income of plaintiff for that year as determined by the Commissioner of Internal Revenue should be reduced in the amount of $47,822.62, made up as follows:

8 *Schedule of bonds released as impounded funds and market value at date of release December 6, 1920*

Bonds Released and on Hand—12-31-20	Face Value	Market	Market Value	Cost per Books
1st—3½% U. S. Bonds	$100,000.00	90	$90,000.00	$100,000.00
3rd—4½% " " "	269,000.00	88	254,320.00	277,820.75
5th—4¼% " " "	523,000.00	96½	499,465.00	513,786.87
			$843,785.00	$891,607.62
Total Market Value				843,785.00
Difference between market value at date of release and cost over books				$47,822.62

(b) That on or about the 23rd day of December, 1913, the plaintiff discovered a new deep oil zone underlying its properties; that said zone at the time of acquisition of said properties and on March 1, 1913, was unknown; that the discovery of said zone was due to the efforts of plaintiff; that the value of the oil content of said deep zone at date of discovery and thereafter was greatly disproportionate to the cost or March 1, 1913 value of said oil properties.

That as of March 10, 1914, the date upon which the United States instituted its suit to divest the plaintiff of its title in and to its forty acre tract, the fair market value of the oil and gas content of said forty acre tract was $1,363,780.00. That the estimated recoverable oil content in said forty acres on that date was 4,998,944 barrels; that the value per barrel of said oil on March 10, 1914 in the said forty acre tract was $.27281.

9 That under the provisions of the Revenue Act of 1918 which governs the determination of taxable income and the amount of tax for the calendar year 1920, the plaintiff was entitled to a deduction for depletion on a unit basis of $.27281 per barrel.

That assuming said impounded funds collected by the receiver from March 10, 1914, through the calendar year 1919 were taxable

income to the plaintiff during the year 1920, then the plaintiff was entitled to a deduction for depletion at the rates and in the amounts provided by the Revenue Act of 1918; that is, as follows:

Depletion on 2,372,881 barrels representing production from March 10, 1914, to December 31, 1920, at $.27281	$647,345.67

Commissioner of Internal Revenue, although charging the entire amount of said impounded funds as income to the plaintiff during the year 1920, erroneously and illegally allowed as a deduction for depletion upon said funds for said year, the rates prevailing and allowable in the years when said oil was actually extracted instead of the basis provided by the Revenue Act of 1918 as depletion actually sustained and as a result thereof allowed the plaintiff as depletion during the year 1920 but $152,571.98, thereby illegally and erroneously denying to the plaintiff a deduction in determining taxable income for the calendar year 1920 of $494,773.69. And the plaintiff is entitled to have its income for the year 1920 reduced by said amount in determining the income subject to tax.

(c) That the Commissioner of Internal Revenue, in determining the taxable net income for the taxable year 1920, erroneously included in the income of the plaintiff, a net amount of $235,945.96, representing proceeds of production prior to March 11, 1914, and interest accrued thereon through December 31, 1919, on the theory that said amounts were impounded with the Receiver and released to the plaintiff during the taxable year 1920. That said proceeds and the interest thereon were never impounded in the hands of the court receiver, but represented income realized to and accrued by the plaintiff during the taxable years 1914 to 1919 inclusive, or in the alternative, were not realized to and accrued by the plaintiff until February 1921.

VIII

The Commissioner of Internal Revenue properly determined the profits tax rate of this taxpayer for the calendar year 1920 as provided by Sections 327 and 328 at 9.67% of plaintiff's income due to the abnormality resulting from the inclusion in plaintiff's income for that year of said impounded funds.

IX

That despite the facts set forth in Paragraph VII above, the defendant exacted from the plaintiff and the plaintiff paid the defendant under protest, compulsion, duress, and coercion, additional income and profits taxes as set forth above for the calendar year 1920 on the date and in the amounts set forth below:

Date	Tax	Interest	Total
July 23, 1926	$264,017.74	$2,144.69	$266,162.43

11

X

Thereafter, on to-wit, the sixth day of December 1927, the plaintiff in the manner provided by law filed with the defendant, the Collector of Internal Revenue for the Sixth Collection District of California, as the agent for the Commissioner of Internal Revenue, its claim for the refund of said tax in the amount of $264,017.17, together with interest in the amount of $2,144.69 paid to the defendant as aforesaid. That said claim for refund sets forth fully, as specified in Paragraph VII hereof, the reasons upon which said claim for refund is predicated.

XI

On or about February 14, 1928, the Commissioner of Internal Revenue rejected in its entirety the plaintiff's said claim for refund.

XII

That in case there is eliminated from plaintiff's income for the year 1920 said impounded funds, the application of Sections 327 and 328 of the Revenue Act of 1918 in the determination of plaintiff's profits tax rate for the year 1920 will become unnecessary. In case plaintiff's income for the calendar year 1920 is reduced only by the additional depletion and by the over-statement due to the erroneous valuation of the bonds, all of which is set forth in Paragraph VII above, then the income of the plaintiff for the calendar year 1920 will nevertheless be abnormal and disproportionate to the income of similar taxpayers engaged in the same line of business for that

12 year. The profits tax rate heretofore employed by the Commissioner of Internal Revenue of 9.67% of plaintiff's net income should, therefore, be employed for the year 1920, assuming only said two adjustments above referred to are made.

XIII

That the defendant erroneously and unlawfully collected from the plaintiff and is erroneously and unlawfully withholding from the plaintiff and is indebted to said plaintiff in the sum of $266,162.48, with interest from July 23, 1926, at 6% representing amounts illegally exacted from the plaintiff on account of additional income and profits taxes for the year 1920. That although often demanded the defendant has not nor has anyone for him repaid or refunded said sum or sums or any part thereof, and said claim of said plaintiff herein is the sole property of the plaintiff and has not been sold, assigned, or transferred to any person or individual.

Wherefore, the plaintiff prays for judgment against the defendant, Galen H. Welch, in the amount of $266,162.43, together with interest at 6% from July 23, 1926, together with plaintiff's costs of suit.

OBISPO OIL COMPANY,
By J. F. BARNEBERG,
J. F. BARNEBERG, *President.*
JOSEPH D. PEELER,
MELVIN D. WILSON,
Attorneys for Plaintiff.

13 [*Duly sworn to by J. F. Barneberg, jurat omitted in printing.*]

[File endorsement omitted.]

14 In United States District Court

Answer to amended complaint

Filed Oct. 21, 1933

Comes now the above-named Defendant, Galen H. Welch, by and through his attorneys, Peirson M. Hall, United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said District, and in answer to Plaintiff's Amended Complaint on file herein, admits, denies, and alleges as follows:

I

Admits the allegations of paragraph I of plaintiff's Amended Complaint.

II

Admits the allegations of paragraph II of plaintiff's Amended Complaint.

III

Admits the allegations of paragraph III of plaintiff's Amended Complaint.

IV

Admits the allegations of paragraph IV of plaintiff's Amended Complaint.

V

Admits the allegations of paragraph V of Plaintiff's Amended Complaint.

VI

Denies the allegations of paragraph VI of said Amended
15 Complaint except that it is admitted that the Commissioner of Internal Revenue during June 1926 duly assessed additional

corporate income and profits taxes for the calendar year 1920 against the plaintiff in the amount of $264,017.74, plus interest in the amount of $2,144.69.

VII

It is admitted that the Commissioner of Internal Revenue added to the plaintiff's taxable income for the calendar year 1920 certain impounded funds released to the plaintiff during the last-named year; and that these funds consisted of monies collected during the period from 1914 to 1919, inclusive, and for the portion of the year 1920 during which certain properties of the plaintiff operated under a Federal Receiver appointed by the United States District Court, pending the outcome of certain litigation then being prosecuted between this plaintiff and the United States. The Defendant specifically denies that the Receiver appointed by the Court was at any time in possession and control of the entire properties of the plaintiff. It is admitted that on the termination of the litigation, certain funds accumulated by the Receiver, were turned over to the plaintiff during the year 1920.

Defendant denies that the funds so collected by the Receiver during the years 1914 to 1919 were taxable income to the plaintiff and/or the recipient when actually collected and received by the Receiver during said years and specifically denies the allegation that said funds or any part thereof were not taxable income to the plaintiff in 1920 on release thereof by said Receiver.

16 For answer to paragraph (2) (a) of paragraph VII of plaintiff's amended complaint, defendant admits that the Commissioner of Internal Revenue erroneously included the bonds therein referred to, in plaintiff's taxable income for the year 1920 at the original cost to said Receiver, instead of their fair market value at the date they were turned over to the plaintiff. Defendant denies, however, that the fair market value of said bonds at the date they were released and turned over to the plaintiff during the year 1920, was $47,822.62 less than the original cost thereof when purchased by said Receiver, but admits that the fair market value of said bonds on said date was $47,461.37 less than the original cost thereof. All other allegations of said subdivision (2) (a) of paragraph VII are denied.

In answer to sub-paragraph (2) (b) of paragraph VII of plaintiff's amended complaint, defendant admits that on or about the 23rd day of December, 1913, plaintiff discovered a new deep oil zone underlying its properties; that said zone at the time of acquisition of said properties and on March 1, 1913, was unknown. All other allegations of said subdivision (2) (b) of paragraph VII of plaintiff's amended complaint are denied, except that it is admitted that the Commissioner of Internal Revenue allowed as a deduction for depletion upon the impounded funds released to the plaintiff during the year 1920, the depletion rates prevailing and allowable in the

years when said oil was actually extracted and actually al-
17 lowed the plaintiff as a deduction for depletion for the year 1920 in the amount of $152,571.98.

The defendant herein, Galen H. Welch, former Collector of United States Internal Revenue for the Sixth Collection District of California, specifically alleges that the allowance of a depletion deduction of $152,571.98 to the plaintiff for the calendar year 1920, or any other amount, was in error and alleges that the plaintiff was entitled to no depletion allowance or deduction for said taxable year 1920.

For answer to sub-paragraph (2) (c) of paragraph VII of said amended complaint, it is admitted that in determining the taxable net income for the taxable year 1920, the Commissioner of Internal Revenue included in the income of the plaintiff a net amount of $235,945.96, which consisted of a principal sum of $197,684.16, representing net proceeds of production prior to March 11, 1914, and taxable interest in the amount of $38,261.80 accrued thereon through December 31, 1919. It is admittd that said proceeds and interest thereon were never impounded in the hands of the Receiver appointed by the Court. All other allegations of said sub-paragraph (2) (c) are denied.

The defendant denies that the plaintiff herein has heretofore made any claim or contention that said $235,945.96, or any part thereof, was not impounded by the Receiver and released by it to the plaintiff during the taxable year 1920, and alleges that the contention now advanced in reference thereto in said sub-paragraph
18 (2) (c) of paragraph VII of said amended complaint, was not included in the claim for refund upon which this suit is based and that by reason thereof the plaintiff is now barred from raising any issue in reference thereto in this proceeding.

Defendant alleges that said sum of $235,945.96 constituted a pledgee account; that said funds were to be held in said account pending the outcome of the litigation between the plaintiff herein and the United States of America; that said litigation was finally terminated and settled during the year 1920; and that said amount of $235,945.96 was actually or constructively received by the plaintiff during said taxable year 1920 and constituted taxable income for said year.

VIII

The defendant admits that the Commissioner of Internal Revenue computed the profits tax of the plaintiff herein for the calendar year 1920, under the provisions of Sections 327 and 328 of the Revenue Act of 1918, but alleges that the rate determined under these provisions is immaterial to this proceeding and for lack of knowledge or information upon which to form a belief, denies that said rate was 9.67%, as alleged in plaintiff's amended complaint. The profits tax determined and assessed by the Commissioner of Internal Revenue for the year 1920 was $142,765.73.

IX

Defendant admits that on or about July 23, 1926, plaintiff paid additional income and profits tax for the taxable year 1920 in the aggregate amount of $266,162.43.

19

X

Defendant admits that on to-wit, the 6th day of December, 1927, the plaintiff filed with the defendant, the Collector of Internal Revenue for the Sixth Collection District of California, a claim for refund of income and profits taxes in the amount of $264,017.17, together with interest in the amount of $2,144.69. Defendant specifically denies that the claim for refund includes all of the reasons herein advanced in this amended complaint for the recovery of the above-named amounts, and alleges that said amended complaint injects issues into this proceeding not heretofore presented for the consideration of the Commissioner of Internal Revenue.

XI

Admits the allegations contained in paragraph XI of plaintiff's amended complaint.

XII

The allegations of paragraph XII are denied and defendant alleges that the Court is without jurisdiction to disturb any finding or determination made by the Commissioner of Internal Revenue as to the profits tax due from the plaintiff for said taxable year 1920.

XIII

Defendant denies that he erroneously or unlawfully collected from the plaintiff or that he was erroneously or unlawfully withholding from the plaintiff or is otherwise indebted to the plaintiff in the sum of $266,162.43 or any other amount or at all. Defendant admits no part of said sum has been repaid to the plaintiff, but alleges that all of the taxes paid by the plaintiff for the taxable years 1914 to 1919 have been heretofore refunded and accepted by the plaintiff. Further collection thereof is now barred by the statute of limitations. For lack of knowledge or information upon which to form a belief, defendant denies the remaining allegations of said paragraph XIII.

20

The defendant affirmatively alleges that the Commissioner of Internal Revenue erroneously allowed as a deduction the amount of $40,683.00, which amount was paid or accrued in connection with the litigation between the United States of America and G. W. McCutcheon, Obispo Oil Company, et al., and which constituted a capital expenditure.

Wherefore defendant prays that plaintiff take nothing by its complaint and that defendant be allowed his costs of suit herein expended as provided by law.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney,
Ignatius F. Parker,
IGNATIUS F. PARKER,
Assistant U. S. Attorney,
Alva C. Baird,
ALVA C. BAIRD,
Assistant U. S. Attorney,
Counsel for Defendant.

21 [*Duly sworn to by Alva C. Baird, jurat omitted in printing.*]

[File endorsement omitted.]

22 In United States District Court

Stipulation waiving jury

Filed Dec. 27, 1928

We, the attorneys for the respective parties hereby waive the trial to the jury of this cause, and agree to submit the same to the Court without the intervention of a jury.

Dated: December 17, 1928.

MILLER, CHEVALIER & LATHAM,
By MELVIN D. WILSON,
Attorneys for Plaintiff.

Dated: December —, 1928.

UNITED STATES ATTORNEY,
By EMMETT E. DOHERTY,
Assistant United States Attorney,
Attorneys for Defendant.

[File endorsement omitted.]

23 In United States District Court

Motion for judgment

Filed Nov. 14, 1933

Now on this 10th day of November, 1933, comes Galen H. Welch, defendant in the above-entitled cause, by his attorneys, Peirson M. Hall, United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue,

and moves for judgment against the plaintiff and in favor of the defendant, and for his costs herein expended, upon the following grounds and for the following reasons:

I

By reason of the pleadings and the record upon which the case is submitted, the plaintiff is not as a matter of law entitled to recover the whole or any part of the sum sued for herein.

II

That this Court has no jurisdiction of the subject matter of this action, the tax sought to be recovered having been assessed under the special assessment provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921 (40 Stat. 1092, 1093).

Dated: This 10th day of November, 1933.

Peirson M. Hall,
PEIRSON M. HALL,
U. S. Attorney, E. H.,
Alva C. Baird,
ALVA C. BAIRD,
Asst. U. S. Attorney, E. H.,
Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant.

24 *Memorandum of points and authorities*

I. The taxes involved in this action were assessed under the "special assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921. (40 Stat. 1092, 1093.)

II. The grant of special assessment and the ascertainment of the rate or ratio of tax to be applied to the net income of the taxpayer are indissolubly connected by the terms of the statute. The exercise of the discretion on both aspects is committed to the Commissioner and to the Board of Tax Appeals upon review of his action. That discretion cannot be reviewed by the Courts, nor exercised by them in place of the administrative officer designated by law. It is beyond the power of a Court to usurp the Commissioner's function of finding that special assessment should be accorded, and equally so to substitute its discretion for his as to the factors to be used in computing the tax. The taxpayer's net income is an essential factor in the problem. Heiner v. Diamond Alkali Company, 53 S. Ct. 413, reversing C. C. A. 3rd, 60 Fed. (2d) 505, which affirmed the District Court, 39 Fed. (2d) 645. See also, Williamsport Wire Rope Co. v. U. S., 48 S. Ct. 587, 6 A. F. T. R. 7797, affirming U. S. Court of Claims, 63 Ct. of Cls., 463; Brown's "Shamrock" Linens, Ltd., v.

Bowers, C. C. A. 2nd, 48 F. (2d) 103, affirming Dist. Court, 41 Fed. (2d) 862; certiorari denied 282 U. S. 865, 51 S. Ct. 657; Blair v. Oesterline Machine Co., 275 U. S. 220.

(Endorsed:) Received copy of the within Motion for Judgment this 10th day of Nov. 1933. Miller, Chevalier, Peeler & Wilson, by Ralph E. Smith, Attorney for Plaintiff.

[File endorsement omitted.]

25 In United States District Court

Memorandum of conclusions and order for judgment

Filed May 21, 1934

This cause has been submitted on the record of the evidence presented at the trial upon which a judgment was rendered and subsequently vacated; together with a stipulation as to certain facts. A motion was earlier presented for judgment in favor of the defendant, based upon the ground that the court has no jurisdiction to adjudicate the issues involved.

I will state my conclusions, only, without entering upon any discussion of the facts, or decisions cited by the parties.

I conclude:

That the court has jurisdiction.

That the amount of money received by the plaintiff from the Receiver in 1920 did not constitute a gift.

That depletion allowances should be made only as of the time after plaintiff received its lease from the Government, to-wit: after April 20, 1920; and that any computation of such depletion allowances should be made under the Revenue Act of 1918.

The parties can together prepare the judgment to be entered, to which exception will be noted in favor of the plaintiff, and also in favor of the defendant on the adverse ruling on the question of jurisdiction.

Dated May 21, 1934.

WM. P. JAMES,
U. S. District Judge.

[File endorsement omitted.]

26 In United States District Court

Findings of fact and conclusions of law

Filed Sept. 23, 1935

The Court herein entered a judgment in this cause, on June 17, 1931, in favor of the Plaintiff, in the amounts prayed for in the Complaint. The decision was reported in 48 Fed. (2d) 872. The

Defendant took an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and, while said appeal was pending, the above entitled proceeding was remanded to this Court as a result of a joint motion filed by Counsel for the respective parties in the United States Circuit Court of Appeals for the Ninth Circuit. The basis of the motion was that

"Counsel for the respective parties are of the opinion that the decision of this Court and of the United States Supreme Court in the case of North American Oil Consolidated v. Burnet, 286 U. S. 417, are controlling as to the issue upon which the instant case was decided. There are, however, issues in controversy which were not adjudicated or determined by the District Court in the first instance."

After the cause was remanded to this Court, the Plaintiff filed an Amended Complaint and the Defendant filed an Answer to the said Amended Complaint.

The above case came on regularly for trial on the 21st day of October, 1933, before the Court, sitting without a Jury, a trial by Jury having been waived by written stipulation of the parties hereto; Plaintiff appearing by Joseph D. Peeler, Esq., and Melvin D. Wilson, Esq., of Miller, Chevalier, Peeler & Wilson, its Attorneys,
27 and the Defendant appearing by Peirson M. Hall, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., and Alva C. Baird, Esq., Assistant United States Attorneys for the said District; and the case having been submitted on written stipulations, and the Court having fully considered the same, hereby makes the following special findings of fact:

I

The Court finds that the Plaintiff, Obispo Oil Company, is, and was at all times hereinafter mentioned, a corporation organized under the laws of the State of California, and having its principal offices and place of business at San Luis Obispo, California.

II

That the Defendant, Galen H. Welch; was, from April 6, 1926, to and including June 30, 1933, the Collector of Internal Revenue for the Sixth Collection District of California, duly commissioned and acting pursuant to the laws of the United States, and resided and had his office in the County of Los Angeles, State of California.

III

That the Plaintiff, prior to the year 1914, was engaged in the development and production of crude petroleum. It was a successor to a claim of title held under a placer mining location, made in the year 1900, covering forty acres of land in the Kern River District of California, described as follows:

The Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of Section Thirty-two (32) of Township Twelve (12) North, Range Twenty-three (23) West, San Bernardino Base and Meridian.

28

IV

That said land as of June 9, 1909, was classified by the Secretary of the Interior as oil bearing. That said land came within the effect of a withdrawal order issued by President Taft on September 27, 1909, which purported to temporarily withdraw designated areas from all forms of "location, settlement, selection, filing, entry, or disposal." Said withdrawal order contained the condition that "all locations or claims existing and valid at this date may proceed to entry in the usual manner after field investigation and examination."

V

At the date of the withdrawal order, Plaintiff had made exploration for oil but had not at the time discovered same, but did make such discovery in June 1910. That notwithstanding said order of withdrawal, Plaintiff maintained possession of the land in question and drilling operations were prosecuted. In December 1913 a well was completed, which became a heavy producer of oil. Other wells were thereafter drilled and the output was thereby increased.

VI

That on or about March 1, 1914, the United States of America filed a bill of complaint in the United States District Court of California, Southern District, against the Plaintiff and others to oust them from possession and to recover proceeds of oil theretofore produced.

VII

That said Court in that action appointed, on or about March 11, 1914, a receiver to take charge of the property with direction
29 to impound the proceeds therefrom pending termination of the litigation. From that time until the year 1920, the Plaintiff proceeded to produce and market oil under the direction of the receiver, making return to the latter of the proceeds thereof.

VIII

That during the period in question the Plaintiff kept its books on an accrual system of accounting, and that the Plaintiff accounted for the income received from the sales of oil during each of the years 1914 to 1920 as separate and independent years, and on its books charged the receiver with the amounts so referred to.

IX

That for each year during the incumbency of the receiver, the Plaintiff made its income tax return to the United States Government, and therein accounted for income and profits as though it were in undisputed ownership and possession.

X

That on or about December 24, 1919, the United States District Court entered its Decree in favor of the United States Government, which provided in part as follows:

"Second. That neither of the defendants nor any of them had at any time, or has now any estate, right, title, or interest whatsoever in or to said Southwest Quarter (SW¼) Section Thirty-two (32) Township Twelve (12) North of range Twenty-three (23) West San Bernardino Base and Meridian, or in or to any petroleum oil, gas, or other minerals therein contained; and all notices, deeds, leases, and other muniments of title under which the defendants or any of them claim, be and they hereby are and each of them hereby is cancelled, set aside and declared null and void from the inception thereof.

"Third. That the equitable title as well as the legal title to said Southwest Quarter (SW¼) of Section Thirty-two (32) Township Twelve (12) North of Range Twenty-three (23) West of the San Bernardino Base and Meridian, and the petroleum, oil, gas, and other minerals therein contained is now and has been at all times mentioned in the Bill of Complaint herein in the plaintiff United States of America free from any claim of defendants or either or any of them.

"Fourth. That the receiver herein is directed to turn over to the plaintiff possession of said land, together with all fixtures thereon or thereto attached upon the filing and approval of his final accounts."

XI

That thereafter the Plaintiff herein perfected its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, claiming that it was holding under a valid location which, having been completed prior to the withdrawal order of September 27, 1909, was unaffected thereby.

XII

That in June, 1910, Congress passed an Act, 36 Stat. L. 847 (amended August 1912, 37 Stat. L. 497), giving express authority to the President to issue withdrawal orders, with the limitation that the rights of bona fide occupants or claimants of oil or gas lands, who at the date of the withdrawal order were in diligent prosecu-

tion of work leading to discovery, should not have their right impaired.

31

XIII

Congress passed an Act, approved February 25, 1920, entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain", providing in part as follows:

"SEC. 18. That upon relinquishment to the United States, filed in the general Land Office within six months after the approval of this act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or by his predecessor in interest under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purpose on the claim, or unavoidably lost. * * *"

XIV

That on April 30, 1920, while its appeal was still pending before the Circuit Court of Appeals, Plaintiff herein made request to relinquish all its right, title, and interest claimed and possessed and take a lease as provided by said Act of February 25, 1920.

32

XV

That said request was approved by the Commissioner of the General Land Office, who reported his view to the Secretary of the Interior, in the course of which communication he said: "I have, therefore, the honor to recommend that the Attorney General be requested, in the absence of any objection which may be a bar to such action, to cooperate with this department with a view to securing a dismissal of the suit, the payment to the United States of the ⅛ value of past production, and the release of the remaining funds to the applicant company. I have also to recommend that the applicant be granted a lease, substantially in the form set out in the leasing regulations, for a term of twenty years, with a provision for the payment of the royalty prescribed in the leasing regulations."

XVI

That on April 30, 1920, the Plaintiff herein filed in the United States Land Office at Los Angeles, California, its unconditional quitclaim to the land in question and, on November 29, 1920, the Plaintiff herein paid to the Federal Reserve Bank of San Francisco, California, for the credit of "Receiver of Public Moneys, United States Land Office, Los Angeles, account Lease Application 032892", the principal amount of $248,406.83, with interest of $6,317.81, representing an amount equal to 1/8 of the value at the time of production of the oil and gas theretofore produced.

XVII

That on November 29, 1920, the Circuit Court of Appeals for the Ninth Circuit, directed, in accordance with stipulation, a man-
33 date to the United States District Court ordering a discharge of the judgment therein against the Obispo Oil Company and the turning over to said Company by the receiver of possession of the land, together with all funds impounded by order of said Court. That on November 30, 1920, an order was entered in said District Court complying with said mandate, and the receiver turned over to Plaintiff herein all the moneys and other assets theretofore impounded by order of said Court.

XVIII

That a considerable part of the impounded proceeds were represented by Liberty Bonds, in which the receiver had made investment at a cost of $891,607.62. Said bonds, when delivered by receiver to the Plaintiff herein, had a market value of $844,146.25, or $47,461.37 less than their cost.

XIX

That the Commissioner of Internal Revenue, upon audit of Plaintiff's income and profits tax return for the calendar year 1920, charged as income for that year the total value of the property relinquished by the receiver to the Plaintiff (and an additional $159,751.56, representing proceeds from the sale of oil produced prior to March 11, 1914, under certain Agreements with the Standard Oil Company, which amounts were never in the possession or under the control of the Receiver), included in which were the Liberty Bonds at their cost. That Plaintiff had reported in said return for 1920 only the income from oil and gas produced during said calendar year.

34 XX

That as a result of said action, the Commissioner of Internal Revenue increased Plaintiff's taxable net income in the amount of

$1,378,077.32, and assessed an additional tax on account thereof in the amount of $264,017.74, together with interest in the amount of $2,144.69, or a total of $266,162.43.

XXI

That the Defendant exacted from Plaintiff, and the plaintiff paid under protest to Defendant on July 23, 1926, said sum of $266,162.43.

XXII

Thereafter, on December 6, 1927, Plaintiff filed in the manner provided by law, a claim for refund in the amount of $266,162.43 so paid, the grounds for which were stated in the claim as follows:

"This claim is based upon the following propositions of law and fact:

"(1) The Commissioner of Internal Revenue erred in determining that certain impounded funds released to the taxpayer during the year 1920 constituted taxable income to the taxpayer during that year. The excess-profits and income tax should have been computed only on the taxpayer's net income from operations for the year 1920, excluding in its entirety the impounded funds released to the taxpayer during that year. The amount refundable to the
35 taxpayer as a result of this error in computing its tax liability for the year 1920 is $264,017.74, as per Exhibit A attached hereto.

"The impounded funds in question constituted moneys collected by a Receiver during the years 1914 to 1919, inclusive, which Receiver was appointed by the U. S. District Court to act pending the determination of litigation between the taxpayer and the United States. The Receiver was at all times in possession and control of the entire properties of the taxpayer. On the termination of this litigation the funds accumulated by the Receiver were turned over to the taxpayer.

"(2) In the alternative, regardless of whether or not said impounded funds are taxable to this taxpayer in the year 1920, the taxpayer is entitled to a refund for tax overpaid for that year of $101,485.29, the details of which are shown on Exhibit B attached hereto. This adjustment is based upon the two following propositions:

"(a) The impounded funds in question were released to the taxpayer December 6, 1920, and consisted largely of U. S. Government Bonds. The market value of said bonds at date of release was less than original cost by the amount of $47,822.62. The Commissioner of Internal Revenue erroneously included these bonds in taxpayer's income for 1920 at their original cost. The net taxable income of the taxpayer for the year 1920 should, therefore, in any event be reduced by said amount of $47,822.62;

36 "(b) In determining taxpayer's depletion deduction on said impounded funds for the year 1920 the Commissioner of In-

ternal Revenue erroneously employed the rates prevailing and allowable in the years in which the oil was actually extracted instead of determining the deduction on the basis of depletion actually sustained. The taxpayer, therefore, on the basis of depletion actually sustained, and even though said impounded funds are all included in its taxable income for the year 1920, is entitled to an additional deduction for depletion for the year 1920 as set forth in Schedule B attached hereto, which additional depletion represents depletion actually sustained.

"(3) The profits-tax rate of this taxpayer for the year 1920 has been determined on the basis of Sections 327 and 328 of the Revenue Act of 1918, based upon the abnormality in income resulting from the inclusion in that year's income of said impounded funds. The income of the taxpayer for the year 1920 will be abnormal and disproportionate to the income of similar taxpayers engaged in the same general line of business for the year 1920 even though the adjustments of income resulting from the adjustment of the value of said securities set forth in 2 (a) above and the additional depletion set forth in 2 (b) above are allowed. The same profits-tax rate heretofore employed, therefore, should be used in determining the taxpayer's net taxable income for the year 1920 after making the adjustments set forth in (2) above."

37 That on or about February 14, 1928, the Commissioner of Internal Revenue rejected Plaintiff's said claim for refund and no part of the taxes and interest covered thereby has ever been repaid or refunded to Plaintiff. That Plaintiff filed its original Complaint herein on December 2, 1928.

XXIII

That in computing the taxable net income of Plaintiff for the calendar year 1920, the Commissioner of Internal Revenue allowed a depletion deduction of $152,571.96, computed on the basis of the production for the various years 1914 to 1920, under the laws then in force, as shown in the right hand column of the depletion schedule set forth in paragraph XXV hereof.

XXIV

That the plaintiff, on or about December 23, 1913, made discovery of oil as defined in Section 234 (a) (9), Revenue Act of 1918, on the lands in question; the fair market value and the oil content at date of such discovery was greatly in excess of the cost of said property; and that the said oil content was, prior to December 23, 1913, unknown.

XXV

That as of March 10, 1914, the oil content of the property, the value thereof, and the production, depletion unit and depletion sustained on the discovery basis was as follows:

38 *Obispo Oil Company* Lessee 7/8 interest

[40 acres SW¼ of SW¼ of Sec. 33-12-23 Kern County, Cal.]

Date	Capital Sum returnable through depletion at beginning of year	Estimated Recoverable Reserves at Beginning of Year	Production in Barrels	Unit per BBL	Depletion Sustained	Depletion Allowed by Commissioner
			Discovery—December 23, 1913			
3/10/14	1,363,780.00	4,998,944	1,385,486	.27281	377,974.44	28,928.93
1915	965,805.56	3,613,458	321,045		87,584.29	6,703.42
1916	898,221.27	3,292,413	118,231		32,254.60	4,970.99
1917	865,966.07	3,174,182	162,778		44,407.47	6,843.84
1918	821,559.20	3,011,404	110,724		30,206.61	30,206.61
1919	791,352.59	2,900,680	128,889		35,162.21	35,162.21
to 4/30 1920	756,190.38	2,771,791	49,894		13,611.58	13,611.58
from 5/1/20	742,578.80	2,721,897	93,834		26,144.47	26,144.47
	716,434.33	2,626,063				
			2,372,881		$647,345.67	$152,571.96

39 XXVI

That the total depletion sustained on the discovery value basis on the oil produced from March 10, 1914, to December, 1920, was $647,345.67.

XXVII

The net income of the Plaintiff, for the taxable year 1920, as otherwise determined, shall be increased in the amount of $40,683.00, representing amounts accrued and paid during said year as capital expenditures in connection with the litigation with the United States Government in the case of United States of America vs. G. W. McCutcheon, Obispo Oil Company, et al., which amount was erroneously allowed as a deduction by the Commissioner of Internal Revenue.

XXVIII

That in determining the taxable net income of Plaintiff for the year 1920, the Commissioner of Internal Revenue made an allowance of $126,427.49 for depletion with respect to oil and gas produced prior to April 20, 1920.

XXIX

During the year 1926, and contemporaneously with the final determination and assessment of the deficiency for the taxable year 1920, here in controversy, the Commissioner of Internal Revenue also audited the returns of the Plaintiff for the taxable years 1914 to 1919 inclusive, and excluded from the taxable income therein, the amounts of impounded income and other items which were added to the taxable income for 1920. As a result of said audit, the Treas-

ury Department refunded to the Plaintiff the following amounts of taxes and interest for said earlier years:

40

Taxable Year	Refund of Tax	Interest
1914	$6,380.60	$2,132.86
1915	1,292.51	404.38
1916	1,749.53	522.92
1917	25,492.40	5,510.98
1918	41,517.87	10,573.58
1919	31,890.17	7,339.16
Total	$108,323.08	$26,483.88

XXX

The Commissioner of Internal Revenue determined the profits taxes of Plaintiff for the calendar year 1920 under the provisions of Sections 327 and 328, Revenue Act of 1918, in the total amount of $142,765.73, or at the rate of 9.67 per cent of Plaintiff's income, subject to profits tax, of $1,476,330.52 for that year. The Commissioner determined the income tax of Plaintiff for 1920 as follows:

Net income		$1,476,330.52
Less:		
Profits tax, Section 328	$142,765.73	
Interest on U. S. obligations not exempt	86,134.16	
Exemption	2,000.00	230,899.89
Balance subject to 10% tax		$1,245,430.63
Amount of tax at 10%		124,543.06

XXXI

That the 1920 income, as determined by the Commissioner of
41 Internal Revenue, is to be reduced $47,461.37, representing an over-statement in the value of Liberty Bonds turned over to the Plaintiff by the Receiver in 1920.

XXXII

That the Plaintiff is entitled to a reduction of its gross income for the taxable year 1920, as otherwise determined, in the amount of $159,751.56, representing proceeds from the sale of oil produced prior to March 11, 1914, together with interest during the years 1914 to 1919, inclusive, under certain Agreements with the Standard Oil Company, which amounts were never in the possession or under the control of the Receiver.

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts, the Court determines that it has jurisdiction of the subject matter of this action, to the extent of determining the correct amount of income tax, even though the profits taxes of Plaintiff for the calendar year 1920 were determined under the special assessment provisions of Sections 327 and 328, Revenue Act of 1918; 40 Stat. 1092–1093.

As a conclusion of law from the foregoing facts, the Court determines that Plaintiff's net income as determined by the Commissioner was excessive in an amount of $47,461.37 on account of over-statement in the value of Liberty Bonds turned over to Plaintiff by the receiver in 1920; and in a further amount of $159,751.56, representing proceeds of oil production prior to the receivership, together with interest on said sums during the taxable years 1914 to 1919, inclusive, which amounts were never in the possession or under the control of the receiver.

42 As a conclusion of law from the foregoing facts, the Court finds that Plaintiff's net income as determined by the Commissioner was understated in an amount of $40,683.00, representing capital expenditures in connection with litigation which were erroneously allowed as deductions.

As a conclusion of law from the foregoing facts, the Court determines that the amount of money and the Liberty Bonds received by Plaintiff from the receiver in 1920 did not constitute a gift, but represented taxable gross income of Plaintiff for that year.

As a conclusion of law from the foregoing facts, the Court determines that Plaintiff is entitled to depletion deductions only on oil and gas produced after it received the lease, namely, April 20, 1920, and is not entitled to any deduction for depletion on oil and gas produced prior to said date; and that Plaintiff's net income as determined by the Commissioner was understated in an amount of $126,427.49, representing the depletion deduction allowed by the Commissioner on oil and gas produced prior to April 20, 1920.

As a conclusion of law from the foregoing facts, the Court determines that Plaintiff's net income as determined by the Commissioner was excessive in the net amount of $40,102.44, upon which the income tax at the rate of 10 per cent was $4,010.24; that the defendant, Galen H. Welch, erroneously and illegally collected from Plaintiff the sum of $4,010.24, and that Plaintiff is entitled to recover

43 from Defendant the sum of $4,010.24, together with interest thereon at the rate of six (6) per cent per annum from July 23, 1926, as provided by law.

The Plaintiff is also entitled to cost of suit herein.

That judgment be entered against the Respondent accordingly.

Dated: September 23, 1935.

WM. P. JAMES,
United States District Judge.

Approved as to form according to Rule 44:

JOSEPH D. PEELER,
MELVIN D. WILSON,
Counsel for Plaintiff.
PEIRSON M. HALL,
United States Attorney,
ALVA C. BAIRD,
Assistant United States Attorney,
Counsel for Defendant.

An exception is noted in favor of the Plaintiff to the findings. An exception is noted in favor of the defendant on the question of jurisdiction. None other being claimed.

WM. P. JAMES,
U. S. Dist. Judge.

[File endorsement omitted.]

44 In United States District Court for the Southern District of California, Central Division

No. 3334–J

OBISPO OIL COMPANY, A CORPORATION, PLAINTIFF

vs.

GALEN H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA, DEFENDANT

Judgment on findings

Filed Dec. 7, 1935

This cause having come on regularly for trial on the 21st day of October 1933, before the Court, sitting without a jury, trial by jury having been waived by written stipulation filed, Joseph D. Peeler, Esq., and Melvin D. Wilson, Esq., of Miller, Chevalier, Peeler & Wilson, appearing as Attorneys for Plaintiff, and Peirson M. Hall, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., and Alva C. Baird, Esq., Assistant United States Attorneys for the said District, appearing as Attorneys for Defendant, and the trial having been proceeded with, and Stipulations and documentary evidence on behalf of the respective parties having been introduced and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings and ordered that judgment be entered in favor of Plaintiff in accordance with said findings;

Now, therefore, by virtue of the law, and by reason of the findings aforesaid, it is considered by the Court that the Plaintiff have judgment in the amount of Four Thousand and Ten and 24/100 Dollars ($4,010.24), plus interest at the rate of six per cent (6%) per
45 annum from July 23, 1926, as provided in Section 615, Revenue Act of 1928, together with Plaintiff's costs of action herein expended taxed at $46.75.

Judgment rendered this 7 day of December 1935.

WM. P. JAMES,
United States District Judge.

Certificate of probable cause

The Court certifies that the Defendant Galen H. Welch, Collector of Internal Revenue, exacted and received payment of the moneys recovered herein in the performance of his official duty, and that there was probable cause for the act done by the Defendant, and that he was acting under the directions of the Secretary of the Treasury, or other proper officer of the Government.

WM. P. JAMES,
Judge of the United States District Court.

Approved as to form as required by Rule 44.

PEIRSON M. HALL,
United States Attorney,
By ALVA C. BAIRD,
Assistant United States Attorney,
Attorneys for Defendant.

MILLER, CHEVALIER, PEELER & WILSON,
By MELVIN D. WILSON,
Attorneys for Plaintiff.

Judgment entered and recorded Dec. 7, 1935. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[File endorsement omitted.]

46 In United States District Court

Engrossed bill of exceptions

Filed Dec. 18, 1935

Be it remembered, that on the 21st day of October 1933 the above entitled cause came on for trial before this Court, Honorable Wm. P. James presiding, the Court sitting without a jury, trial by jury having been waived in writing by counsel for the respective parties.

The case was submitted on written Stipulations of Facts, and a further Stipulation introducing into evidence all the evidence introduced in the former trial of this case before this Court, excepting the evidence in the former trial as may be inconsistent with, or affected by, the facts stipulated in the Stipulation filed at the second trial. Briefs were filed and the cause submitted for decision.

Plaintiff appeared by Messrs. Miller, Chevalier, Peeler & Wilson, by Joseph D. Peeler, Esq., and Melvin D. Wilson, Esq., and the Defendant appeared by Peirson M. Hall, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., and Alva C. Baird, Esq., Assistant United States Attorneys for the said District.

The Court, on May 21, 1934, made and entered a Memorandum of Conclusions and Order for Judgment, instructing the parties to prepare, together, the Findings of Fact and Conclusions of Law to be entered, stating that exception would be noted in favor of the

Plaintiff, and also in favor of the Defendant on the adverse ruling on the question of jurisdiction.

On September 23, 1935, the parties, pursuant to the Court's order, filed Findings of Fact and Conclusions of Law, which the
47 Court signed on the date mentioned. The Court allowed an exception to the Findings in favor of Plaintiff, and an exception in favor of Defendant on the question of jurisdiction, and wrote on the end of the Conclusions of Law the following: "An exception is noted in favor of the Plaintiff to the findings. An exception is noted in favor of the Defendant on the question of jurisdiction. None other being claimed. Wm. P. James, U. S. Dist. Judge."

Stipulation re approval of bill of exceptions

It is hereby stipulated and agreed by and between Attorneys for Plaintiff and Defendant that the foregoing Bill of Exceptions has been presented in time, that it contains all evidence given, and proceedings had in the trial of this action material to the appeal of Plaintiff, and that it may be approved, allowed, and settled by the Judge in the above entitled Court as correct in all respects, and that the same shall be made a part of the record in said case and be the bill of exceptions therein, and that said Bill of Exceptions may be used by either Plaintiff or Defendant upon any appeal taken by either Plaintiff or Defendant.

Dated: December 13, 1935.

MILLER, CHEVALIER, PEELER & WILSON,
By JOSEPH D. PEELER,
By MELVIN D. WILSON,
Attorneys for Plaintiff.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

48 *Order approving and settling bill of exceptions*

The foregoing Bill of Exceptions, duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed, and settled and made a part of the record herein, and said Bill of Exceptions may be used by the parties, Plaintiff or Defendant, upon any appeal taken by either party, Plaintiff or Defendant.

Dated: December 18, 1935.

WM. P. JAMES,
United States District Judge.

(Endorsed:) Received copy of the within Engrossed Bill of Exceptions this 13 day of December 1935. Peirson M. Hall, Alva C. Baird.

[File endorsement omitted.]

49 In United States District Court

Petition for appeal

Filed Dec. 23, 1935

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The above-named Plaintiff, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 7th day of December, 1935, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and Plaintiff prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court in such cases made and provided.

And your Petitioner further prays that the proper order relating to the required security to be required of Plaintiff be made.

Dated: December 13, 1935.

MILLER, CHEVALIER, PEELER & WILSON,
By JOSEPH D. PEELER,
By MELVIN D. WILSON,
Attorneys for Plaintiff.

(Endorsed:) Received copy of the within Petition for Appeal this 13 day of December 1935, Peirson M. Hall, Alva C. Baird, Attorney for defendant.

[File endorsement omitted.]

50 In United States District Court

[Title omitted.]

Assignment of errors

Filed Dec. 23, 1935

Now comes the Plaintiff in the above entitled cause, and files the following assignment of errors upon which Plaintiff will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 7th day of December, 1935.

1. The Court erred in failing to find that the amount of money and the Liberty Bonds, received by the Plaintiff from the Receiver in 1920, constituted a gift exempt from income taxation.

2. The Court erred in failing to find that Plaintiff was entitled to an additional depletion deduction, in 1920, of $516,598.10, com-

51 puted under Section 234 (a) of the Revenue Act of 1918, on the discovery basis, on the oil produced during the period of the receivership.

Wherefore, the Appellant prays that said Decree be modified and that said United States District Court for the Southern District of California, Central Division, be ordered to enter a decree modifying the decision in said cause.

Dated: December 13, 1935.

MILLER, CHEVALIER, PEELER & WILSON,
By JOSEPH D. PEELER,
By MELVIN D. WILSON,
Attorneys for Plaintiff and Appellant.

(Endorsed:) Received copy of the within Assignment of Errors this 13 day of December 1935. Peirson M. Hall, Alva C. Baird, Attorneys for Defendant.

[File endorsement omitted.]

52 In United States District Court

Order allowing appeal

Filed Dec. 23, 1935

Upon reading the Petition for Appeal of the Plaintiff and Appellant, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Circuit, from the decree heretofore filed and entered herein, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal to be filed by Plaintiff be fixed at the sum of $250.00 and the same act as a bond for cost on appeal.

Dated: December 23, 1935.

WM. P. JAMES,
United States District Judge.

(Endorsed:) Received copy of the within Order Allowing Appeal this 13 day of December, 1935. Peirson M. Hall, Alva C. Baird.

[File endorsement omitted.]

53 [Bond on appeal for $250.00 approved and filed Dec. 23, 1935, omitted in printing.]

55 In United States District Court

Stipulation re appeal

Filed Dec. 24, 1935

It is hereby stipulated between the parties hereto, through their respective Counsel, as follows:

That, subject to approval of the Court, the appeal taken by the Plaintiff may be docketed with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, on or before December

26, 1935, in order that the appeal may be placed on the 1936 Spring Calendar, and

That the Plaintiff may have until January 6, 1936, within which to print and file the Transcript of Record with the Clerk of the Circuit Court.

Dated at Los Angeles, California, December 23, 1935.

MILLER, CHEVALIER, PEELER & WILSON,
By MELVIN D. WILSON, *Attorney for Plaintiff.*
PEIRSON M. HALL, *United States Attorney,*
ALVA C. BAIRD,
Assistant United States Attorney,
Attorneys for Defendant.

Approved and it is so ordered.

WM. P. JAMES,
Judge of the United States District Court.

[File endorsement omitted.]

56 In United States District Court

Praecipe for transcript of record

Filed Dec. 24, 1935

TO THE CLERK OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Please issue a certified transcript of record in the above entitled case on appeal to the Circuit Court of Appeals for the Ninth Circuit, consisting of the following:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Stipulation Waiving Jury.
4. Findings of Fact and Conclusions of Law.
5. Memorandum of Conclusions and Order for Judgment.
6. Judgment on Findings.
7. Engrossed Bill of Exceptions.
8. Petition for Appeal.
9. Assignment of Errors.
10. Order Allowing Appeal, and Order Fixing Cost Bond.
11. Bond to Cover Costs on Appeal.
12. Citation on Appeal.
13. Stipulation, dated December 23, 1935.
14. Praecipe.
15. Motion for Judgment.

MILLER, CHEVALIER, PEELER & WILSON,
By MELVIN D. WILSON,
Attorneys for Plaintiff.

57 Counsel for Defendant does not desire to file a counter-praecipe.

PEIRSON M. HALL,
United States Attorney,
ALVA C. BAIRD,
Assistant United States Attorney,
Attorneys for Defendant.

(Endorsed:) Received copy of the within Praecipe for Transcript of Record this 24 day of December 1935, Peirson M. Hall, By E. H. Mitchell, Attorney for Defendant.

[File endorsement omitted.]

58 [Clerk's Certificate to foregoing transcript omitted in printing.]

61 [Names and addresses of attorneys omitted in printing.]

62 [Citation in usual form showing service on Melvin D. Wilson filed March 9, 1936, omitted in printing.]

63 In United States District Court for the Southern District of California, Central Division

No. 3334–J

OBISPO OIL COMPANY, A CORPORATION, PLAINTIFF

vs.

GALEN H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA, DEFENDANT

Petition for cross-appeal

Filed March 7, 1936

To the above-entitled Court and to the Honorable William P. James, Judge thereof:

Your petitioner, the defendant in the above-entitled cause, respectfully shows that the Obispo Oil Company, a corporation, the plaintiff in the above-entitled cause, has been allowed an appeal herein from the Judgment entered herein on the 7th day of December
64 1935, in this cause, and your petitioner also considers himself aggrieved by such Judgment as entered herein in favor of said plaintiff, and therefore, hereby prays for the allowance of a Cross-Appeal from the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit from said Judgment and in connection with

said Petition hereby presents Assignment of Errors dated March 6, 1936.

Dated March 6, 1936.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney.
E. H. Mitchell,
E. H. MITCHELL,
Special Assistant, U. S. Attorney.
Alva C. Baird,
ALVA C. BAIRD,
Assistant United States Attorney.

[File endorsement omitted.]

65 In United States District Court

No. 3334–J

Defendant and cross-appellant's assignment of errors

Filed March 7, 1936

The Defendant and Cross-Appellant above-named makes and files the following Assignment of Errors upon which he will rely in the prosecution of his cross-appeal from the judgment of this Court entered herein on the 7th day of December 1935:

I

The Court erred in rendering judgment against the Defendant and in favor of the Plaintiff in the sum of $4,010.24, together with interest thereon and costs, in that by reason of the pleadings and the record upon which the case is submitted Plaintiff is not, as a matter of law, entitled to recover the whole or any part of the sum sued for herein.

II

The Court erred in rendering judgment against the Defendant and in favor of the Plaintiff herein for the reason that the Court has no jurisdiction over the subject matter of this action, the tax sought to be recovered having been determined and assessed by the Commissioner of Internal Revenue of the United States under the special assessment provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921 (40 Stat. 1092, 1093).

66 WHEREFORE the Defendant prays that the Judgment entered herein be reversed and that a Judgment be ordered herein that

Plaintiff take nothing and that the Defendant have his costs and disbursements as provided by law.

Dated this 6th day of March 1936.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney.
E. H. Mitchell,
E. H. MITCHELL,
Special Assistant, U. S. Attorney.
Alva C. Baird,
ALVA C. BAIRD,
Assistant United States Attorney.

[File endorsement omitted.]

67 In United States District Court

No. 3334-J

[Title omitted.]

Order allowing cross-appeal

Filed March 7, 1936

The Defendant herein, Galen H. Welch, Collector of Internal Revenue for the Sixth District of California, having filed his petition for cross appeal from the judgment entered herein against said Defendant, together with his assignment of errors herein,

It is hereby ordered that the cross appeal prayed for in said Petition of Defendant in the above-entitled cause be allowed.

Dated March 7, 1936.

Wm. P. James,
WILLIAM P. JAMES.

[File endorsement omitted.]

68 In United States Circuit Court of Appeals for the Ninth Circuit

No. 8079

[Title omitted.]

Stipulation re use of one transcript upon two appeals

Filed March 9, 1936

UNDOCKETED

Whereas a transcript of the record containing a Bill of Exceptions has been prepared and filed in above entitled Court by above named Plaintiff-Appellant, Obispo Oil Co., a corporation, in said appeal

numbered 8079, and such transcript contains all of the record necessary for a review of the issues raised in an appeal from the same Judgment by the Defendant-Appellant, Galen H. Welch, formerly Collector of Internal Revenue for the Sixth Collection District of California, in above entitled undocketed appeal,

Now, therefore, it is hereby stipulated and agreed by and between the adverse parties to each of above entitled appeals, that the
59 transcript of the record referred to above, including the Bill of Exceptions therein contained, may be used as the record in the appeal entitled Galen H. Welch, Defendant-Appellant, vs. Obispo Oil Co., a corporation, Plaintiff-Appellee, which appeal is at this time undocketed, together with a record of such other matters, pleadings, orders, and documents as Defendant-Appellant may desire to present in support of his appeal.

Dated this 9th day of March 1936.

MILLER, CHEVALIER, PEELER & WILSON,
By MELVIN D. WILSON,
Attorneys for Plaintiff-Appellee.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney,
Alva C. Baird,
ALVA C. BAIRD,
Asst. U. S. Attorney,
E. H. Mitchell,
E. H. MITCHELL,
Spec. Asst. U. S. Attorney,
Attorneys for Defendant-Appellant.

[File endorsement omitted.]

70 In United States District Court

No. 3334–J

Praecipe for transcript of record

Filed March 10, 1936

To R. S. ZIMMERMAN,
Clerk of the United States District Court,
Southern District of California:

You will please issue a transcript of the Record in the above-entitled action and include therein the following papers:

1. Citation.
2. Petition for Cross-Appeal.
3. Assignment of Errors.
4. Order Allowing Cross-Appeal.

5. Clerk's Certificate and this Praecipe.
6. Stipulation re use of Record.

Dated this 6th day of March 1936.

PEIRSON M. HALL,
United States Attorney,
E. H. MITCHELL,
Special Asst., U. S. Attorney,
ALVA C. BAIRD,
Assistant U. S. Attorney,
Attorneys for defendant.

(Endorsed:) Received copy of the within Praecipe this 9th day of March 1936. Melvin D. Wilson of Miller, Chevalier, Peeler & Wilson, attorneys for Plaintiff.

[File endorsement omitted.]

71 [Clerk's Certificate to foregoing transcript omitted in printing.]

United States Circuit Court of Appeals for the Ninth Circuit

No. 8079

OBISPO OIL COMPANY, A CORPORATION, APPELLANT

vs.

GALEN H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH COLLECTION DISTRICT OF CALIFORNIA, APPELLEE

Upon appeal from the District Court of the United States for the Southern District of California, central division

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Wednesday, April 8, 1936

Before WILBUR, GARRECHT, and HANEY, Circuit Judges

Order of submission

Ordered appeal and cross-appeal in above cause argued by Mr. Joseph D. Peeler, counsel for Obispo Oil Company, and by Mr. L. W. Post, Special Assistant to the Attorney General, counsel for Collector, and submitted to the court for consideration and decision, with leave to counsel for Obispo Oil Company to file a further brief in five days.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, September 28, 1936

Before GARRECHT, DENMAN, and HANEY, Circuit Judges

Order directing filing of opinion and dissenting opinion and filing and recording of decree

By direction of the court, ordered that the opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

115487—36

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 8079. September 28, 1936

OBISPO OIL COMPANY, A CORPORATION, APPELLANT

vs.

GALEN H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH COLLECTION DISTRICT OF CALIFORNIA, APPELLEE

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Before WILBUR, GARRECHT, and HANEY, Circuit Judges

HANEY, *Circuit Judge:* Appeal has been taken by Obispo Oil Company, a corporation, from a judgment entered in its favor for $4,010.24 in an action brought by it against appellee to recover $266,162.43, alleged to have been illegally exacted from appellant on account of additional income and profits taxes for the year 1920. Appellee has also appealed, but will hereinafter be referred to as appellee.

The findings of fact made by the trial court are not in dispute.

Appellant was a successor to a claim of title held under a placer mining location, made in the year 1900, covering forty acres of land in the Kern River District of California, and prior to the year 1914 was engaged in the development and production of crude petroleum.

The Secretary of the Interior classified the land in question as oil bearing on June 9, 1909. Such land was described in the Taft withdrawal order of September 27, 1909, which purported to temporarily withdraw such land from all forms of "location, settlement, selection, filing, entry, or disposal." The Taft order also contained the condition that "all locations or claims existing and valid at this date may proceed to entry in the usual manner after field investigation and examination."

In June 1910, Congress passed an Act (36 Stat. 847; amended, 37 Stat. 497) granting express authority to the President to issue withdrawal orders, with the limitation that the rights of bona fide occupants or claimants of oil or gas lands, who at the date of the withdrawal order were in diligent prosecution of work leading to discovery, should not have their right impaired.

At the date of the Taft order, appellant had made exploration for oil, but did not discover oil until June 1910. Thereafter appellant remained in possession of the land, commenced drilling operations, and in December 1913 completed a well which became a heavy producer of oil. Other wells were thereafter drilled and the output thereby increased.

About March 1, 1914, the United States commenced a suit against appellant and others to recover possession of the land and to recover the proceeds of oil theretofore produced (and sold?). About March

11, 1914, the court, in that suit, appointed a receiver to take charge of the property, with direction to impound the proceeds therefrom, pending termination of the litigation. From that time until November 1920, or shortly thereafter, appellant produced and marketed the oil under the direction of the receiver, making return to the latter of the proceeds thereof.

During the period in question, appellant kept its books on an accrual system of accounting, and accounted for the income received from the sales of oil during each of the years 1914 to 1920 as separate and independent years, and on its books charged the receiver with the amounts so referred to. For each of these years appellant made its income tax returns and therein accounted for income and profits as though it were in undisputed ownership and possession.

On December 24, 1919, a decree was entered in the suit mentioned in favor of the United States, adjudicating that "defendants nor any of them had at any time, or has now any estate, right, title, or interest whatsoever, in or to" the land hereinabove mentioned. Appellant thereafter appealed to this court, claiming that it was holding under a valid location which was completed prior to the withdrawal order of September 27, 1909, and was therefore unaffected thereby.

The Leasing Act of February 25, 1920,[1] provided that upon relinquishment to the United States by a claimant or his successor of his right, title and interest, in oil bearing land claimed under the preexisting placer mining law, and on which one or more oil or gas wells had been produced, and upon payment of certain amounts therein specified, the claimant or his successor would be entitled to a lease for a period of twenty years.

On April 30, 1920, while its appeal was still pending before this court, appellant made request to relinquish its interest and obtain a lease, and on that date paid for the benefit of the United States the respective amount of money required by the statute. The request was approved and on November 29, 1920, this court, in accordance with a stipulation, directed a mandate to the court below ordering a *discharge* of the decree, ordering the receiver to turn over possession of the land and the impounded funds to appellant. On November 30, 1920, an order was entered in the trial court complying with said mandate, and the receiver turned over to appellant all the money and assets theretofore impounded.

The trial court found that the commissioner had overstated certain items and had understated certain items. By subtracting the total of the latter items from the total of the former items, the court found a net overstatement, on which a tax was illegally exacted and gave judgment for the amount of such tax.

The Revenue Act of 1918, ch. 18, § 233 (40 Stat. 1057) provides that in the case of a corporation subject to tax, the term "gross in-

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[1] 41 Stat. 437 (Ch. 85, §18).

come" means the gross income as defined in § 213. Section 213 provides:

"That for the purposes of this title . . . the term 'gross income'—

"(a) Includes gains, profits, and income derived from . . . the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

"(b) Does not include the following items, which shall be exempt from taxation under this title:

. . . . . .

"(3) The value of property acquired by gift, bequest, devise, or descent (but income from such property shall be included in gross income); . . ."

Appellant first contends that the property turned over by the receiver was a gift, and therefore should not have been included as income.

In 1 Bouv. Law Dict. (Rawle's Third Rev.) 1352, a gift is defined as:

"A voluntary conveyance or transfer of property, that is, one not founded on the consideration of money or blood,"

In the instant case there was no absence of consideration, for appellant relinquished its claims, and the government relinquished most of the moneys impounded and granted a lease. There was no gift. This conclusion is supported by Burke-Divide Oil Co. v. Neal (C. C. A. 7), 73 F (2d) 857.

Edwards v. Cuba Railroad, 268 U. S. 628, 69 L. Ed. 1124, 45 S. Ct. 614, relied on by appellant, is an example of a pure gift, and is not contrary to our conclusion.

The other contention raised by appellant is that the trial court erred in disallowing as a deduction the sum of $152,571.96, which amount the commissioner had allowed for depletion, and which was computed on the basis of the production for the various years 1914 to 1920, under the laws then in force. Appellant contends that it is entitled to a deduction for depletion of $516,598.10, which is the depletion deduction permitted under the law (Revenue Act of 1918) existing in 1920 at the time when it received from the receiver its share of the impounded funds.

Appellee contends, as the trial court held, that appellant is entitled to depletion deductions only from the date of its lease with the United States, and is not entitled to any depletion deduction for oil and gas produced prior to that date. This contention is based on the proposition, that prior to the date of the lease, appellant had no economic interest in the oil and gas.

In appellant's brief, we find the following statement:

". . . If this court holds that these proceeds constituted taxable income to appellant in 1920, and that appellant is entitled to a depletion allowance in accordance with the law then in force, the parties have stipulated the amount which would be deductible."

Both appellant and appellee apparently concede that the depletion deduction allowed by the commissioner was erroneous. The issue is then, whether appellant had an economic interest in the oil and gas production prior to the date of the lease, for if appellant had an economic interest in the oil and gas prior to the date of the lease, it is entitled to a depletion deduction. Palmer v. Bender, 287 U. S. 551; Helvering v. Falk, 291 U. S. 183, 188; Signal Gasoline Corp. v. Commissioner (C. C. A. 9), 66 F. (2d) 886.

The burden of proof is on appellant to prove that it is entitled to a deduction for depletion. Signal Gasoline Corp. v. Commissioner (C. C. A. 9), 77 F. (2d) 728, 729.

Generally speaking, any person who has a right to share in the oil produced "has an economic interest in the oil, in place, which is depleted by production." Palmer v. Bender, supra, 557. The test in the instant case is, then, whether or not appellant had a right to share in the oil produced.

Law Opinion 1110 of the Treasury Department, published in the Internal Revenue Bulletin C. B. II–1, in 1923, held that the possessory rights, together with the claim of title asserted under the placer mining laws, which had not been finally adjudicated, were sufficient to show an economic interest in the property. The Board of Tax Appeals seems to have made like holdings in National Petroleum & Refining Co., 28 B. T. A. 569; Ralph W. Crews, 30 B. T. A. 615. Compare Champlin v. Commissioner (C. C. A. 10), 78 F. (2d) 905.

There seems to be little doubt that appellant had an economic interest in the property prior to the date of the lease. Congress made provision for recognition of all such claims, and the United States thereafter in fact recognized the interest by accepting a conveyance of such interest to itself. We hold that appellant had an economic interest in the property prior to the date of the lease.

We find nothing in the government's brief to answer other than the following proposition, which has already been answered:

(After stating certain facts outlined above)

"It is submitted that these facts disclose that the taxpayer had no interest whatever—legal, economic, or otherwise—in the property in question prior to 1920 . . ."

No case is cited to support such statement. It is also said:

". . . It is true that the Bureau of Internal Revenue has not been consistent in its application of the depletion provisions of the revenue acts in cases involving impounded funds. In recent years the courts have ruled on various aspects of the depletion question, and it would appear that the decision below is in agreement with the weight of judicial authority."

The Treasury Department ruled correctly on the matter in 1923. If the Commissioner had followed that ruling there would have been no occasion for inconsistency of application. The statement that the trial court's decision was in agreement with the weight of judicial authority is unsupported by any citations.

In appellee's cross-appeal the specification of error is that the trial court erred—

"In holding and deciding that it had jurisdiction of the subject matter of this action to the extent of determining the correct amount of income tax, even though the profits taxes of the taxpayer were determined under the special assessment provisions of the 1918 Act."

Title III of the Revenue Act of 1918 is entitled "War-Profits and Excess-Profits Tax." Sec. 327 (40 Stat. 1057, 1093) provides that in four instances, the tax shall be determined as provided in § 328. This latter section provides a method by which the Commissioner shall compute such profits-tax. The tax is distinct from the income tax under Title II. In computing the income tax a credit is allowed, by § 236 (b) for any profits-tax paid under Title III.

In the instant case appellant was subjected to a profits-tax which, in computing the income tax, was allowed as a credit. Appellee's contention is that since the special assessment of the profits-tax is a discretionary matter, entrusted to the Commissioner, over which, in the absence of fraud, the courts may not interfere, and since that tax must be allowed as a credit in computing the net income for income tax purposes, the discretionary character of the Commissioner's action also extends to the determination of the net income, and therefore the trial court could not interfere with the income tax as imposed.

This contention must be rejected. See Welch v. St. Helens Petroleum Co. (C. C. A. 9), 78 F. (2d) 631, 636. In computing income taxes, the right to credits enumerated by the statute are not dependent on the exercise of the Commissioner's discretion. Such credits are by statute extended to all alike, and the Commissioner may not, by exercising his discretion with regard to one credit, preclude a taxpayer from using other deductions permitted by statute, over which the Commissioner has no discretion. The Commissioner's discretion extends to the amount of this particular credit, and not to the right to claim deductions. A contrary holding would permit the Commissioner to enforce the statute or refuse to enforce it, according to his will, contrary to the intention of Congress.

Appellee cites Williamsport Co. v. U. S., 277 U. S. 551; Heiner v. Diamond Alkalai Co., 288 U. S. 502; Cleveland Automobile Co. v. U. S. (C. C. A. 6), 70 F. (2d) 365 (Certiorari denied, 293 U. S. 563); and Joseph Joseph & Bros. Co. v. U. S. (C. C. A. 6), 71 F. (2d) 389. We believe none of them to be contrary to this holding.

Reversed.

No. 8079

OBISPO OIL COMPANY, A CORPORATION, APPELLANT

vs.

GALEN H. WELCH, COLLECTOR OF INTERNAL REVENUE, ETC., APPELLEE

WILBUR, Circuit Judge, dissenting:

I dissent and will briefly indicate the reason therefor. With the holding of the majority that the amount of money paid to the appel-

lant by the government in connection with the settlement was not a gift, I am in full accord. I think, however, that the amount so paid was income to the taxpayer which was not subject to a deduction for depletion of the value of the land or of the oil content thereof by reason of the extraction of oil therefrom, because the land did not belong to the petitioner. The settlement authorized by Congress and entered into by the petitioner by its terms which authorized a lease from the government, in effect required the petitioner to recognize that until the settlement, and after it, the title to the oil land and its oil content was in the United States. It follows that the petitioner by the terms of the settlement of its rights admitted and was required by the act of Congress to admit that it had no interest in the land which belonged to the United States and which had been withdrawn from entry. On the other hand, the government unqualifiedly admitted the right of the petitioner to seven-eighths of the money impounded in court. That this admission was predicated upon the fact that the money was derived from the sale of oil extracted from the land occupied by the petitioner did not give the petitioner any interest in the land. On the contrary, it was a part of the consideration paid by the government (the other part was the lease) for a contract by which the petitioner in legal effect disclaimed any interest therein. Consequently, it was the United States and not the petitioner which suffered depletion of its lands by reason of the production of oil therefrom.

(Endorsed:) Opinion. Filed Sep. 28, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8079

ORISPO OIL COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE

vs.

GALEN H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH COLLECTION DISTRICT OF CALIFORNIA, APPELLEE AND CROSS-APPELLANT

Judgment

Upon appeal and cross-appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcripts of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is, reversed.

(Endorsed:) Judgment. Filed and entered September 28, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8079

OBISPO OIL COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE

vs.

GALEN H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH COLLECTION DISTRICT OF CALIFORNIA, APPELLEE AND CROSS-APPELLANT

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit to record certified under Rule 38 of the Revised Rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two volumes, consisting of volume, labeled Transcript of Records, of fifty-nine pages, being record on appeal of Obispo Oil Company, and volume, labeled Supplemental Transcript of Record, of eleven pages, being papers on appeal of Welch, Collector, and proceedings in this Circuit Court of Appeals, being pages 12 to and including 22, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals for the Ninth Circuit, made pursuant to request of Mr. J. Stanley Reed, Solicitor General of the United States, counsel for Welch, Collector, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of December, A. D. 1936.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

Order allowing certiorari

Filed February 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 41142. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 602. Galen H. Welch, Former Collector of Internal Revenue for the Sixth Collection District of California, petitioner, vs. Obispo Oil Co. Petition for a writ of certiorari and exhibit thereto. Filed December 28, 1936. Term No. 602 O. T. 1936.

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